No. 85-1772 (7)

In the Supreme Court
OF THE
United States

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OCTOBER TERM, 1986

THE STATE OF UTAH, by and through its
DIVISION OF STATE LANDS,
Petitioner,

VS.

UNITED STATES OF AMERICA; DONALD P. HODEL,
Secretary of the Interior;
ROBERT F. BURFORD, Director of the Bureau
of Land Management within the
Department of the Interior; and
ROLAND G. ROBISON, JR., Utah State Director
of the Bureau of Land Management,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit**

BRIEF OF THE STATES OF ALASKA, ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, TEXAS, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a pre-statehood federal withdrawal and reservation can defeat a state's sovereign ownership of lands underlying navigable waters under the equal footing doctrine.

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INTEREST OF AMICI CURIAE

For more than 140 years, this Court consistently has held that title to lands underlying navigable rivers and lakes is an incident of sovereignty reserved to the several states, subject only to the powers surrendered to the national government in the Constitution. This sovereign ownership vested in the original thirteen states as direct successors to the English crown, and was retained by them when they formed the Union. Because the Constitution requires that all states are equal with respect to sovereignty, the United States holds such lands in territories in trust for future states, and title passes from the federal government to new states when they join the Union and assume sovereignty on an "equal footing" with previously-admitted states.[1]

The only exception to this equal footing doctrine which this Court has permitted is the very rare situation where the United States conveyed title to lands underlying navigable waters to a third party prior to statehood.[2] In this case, the Court of Appeals for the Tenth Circuit created a new exception, holding that the pre-statehood federal designation of Utah Lake as a potential reservoir site, as distinct from a pre-statehood conveyance to a third party, defeated Utah's sovereign title to the lakebed under the constitutional equal footing doctrine.

There are many navigable rivers and lakes within the boundaries of several of the states appearing as *amici curiae*. A number of these navigable waterbodies lie within the exterior boundaries

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[1] *See generally Montana v. United States*, 450 U.S. 544, 551-552 (1981), and cases cited.

[2] The only time this Court has found such a conveyance was *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), characterized in *Montana* as "a singular exception" to the otherwise "established line of cases," 450 U.S. at 555 n.5, holding that title to submerged lands vests in the states at statehood. To be distinguished are cases in which this Court has recognized the validity of grants by foreign governments prior to the United States acquiring the territory. *See e.g., Knight v. United Land Association*, 142 U.S. 161 (1891) (pre-territorial Mexican grant).

of pre-statehood federal withdrawals and reservations[3] similar to the pre-statehood federal designation of Utah Lake as a potential reservoir site. Accordingly, and in light of the generally recognized excessive use of federal withdrawal authority,[4] a number of the *amici* states have a direct proprietary interest in the outcome of this case.

But the issue here goes well beyond a mere question of title: "Here, however, we are not dealing with substantive property law as such, but rather with an issue substantially related to the constitutional sovereignty of the States." *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 381 (1977). The specific issue presented in this case—the effect of a pre-statehood federal withdrawal and reservation on a state's

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[3] The terms "withdrawal" and "reservation," although commonly used together, denote distinct concepts. A "withdrawal" of public lands removes them from settlement, sale, or entry under some or all of the public land laws. *See* E. C. Baynard III, Public Land Law and Procedure, § 5.1 at 148-151 (1986). A "reservation" reserves the lands for some particular use, purpose or program. *Id.*, § 5.36 at 179.

[4] The Public Land Law Review Commission stated:

> Concern about problems associated with the "withdrawal" and "reservation" of public domain lands was strongly voiced in the deliberations which led to the creation of the Commission, and was a recurring subject of complaint in the Commission's public meetings. *The contractor's study of withdrawals indicates that they have been used by the Executive in an uncontrolled and haphazard manner.*
>
> . . .
>
> . . . *In short, the excessive use of Executive withdrawals has become a source of increasing controversy.*

Public Land Review Commission, *One Third of the Nation's Land* (1970) at 43-44 (footnote omitted; emphasis added). As just one example, "95 million acres—more than one-fourth of the total area of Alaska—[was] enclosed within various Federal withdrawals and reservations" at the time Alaska was admitted to the Union. H. Rep. No. 624, 85th Cong., 1st Sess. 6 (1957). This federal practice, widespread throughout many of the more recently admitted states, had "been carried to extreme lengths" in Alaska such that many withdrawals were "either excessive in size or totally unnecessary." *Id.* at 6-7.

sovereign title under the equal footing doctrine—has significant implications beyond those respecting sovereign state title to lands underlying navigable waters. This case may be viewed as but one example of an increasing federal encroachment on state sovereignty,[5] and presents a basic question concerning the relationship between the inherent sovereignty of the several states and the powers surrendered to the national government in the Constitution. As such, it is of vital importance to all *amici* states.

SUMMARY OF ARGUMENT

Ownership of the beds of navigable waterbodies is an inherent attribute of state sovereignty under the equal footing doctrine. The only exception to this doctrine is the very rare circumstance where the United States has conveyed title to lands underlying navigable waters to a third party prior to statehood.

This Court has never held that a federal withdrawal and reservation of lands underlying navigable waters—as distinguished from a conveyance to a third party—defeats a state's sovereign title under the equal footing doctrine. Indeed, this Court has recognized that a federal withdrawal and reservation, even if it includes submerged lands, is not a conveyance and has no effect on title to the lands.

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[5] Even the federal executive's Working Group on Federalism, chaired by the head of the Office of Legal Counsel in the Department of Justice, has recognized this gradual change in the relationship between the national government and the states. *See The Status of Federalism in America*[:] *A Report of the Working Group on Federalism of the Domestic Policy Council* (November 1986). *Amici* states find it ironic that the United States, while decrying " . . . the erosion of federalism in this country [and t]he nationalization of state sovereignty," *id.* at 2, simultaneously seeks in this case to nationalize state sovereign submerged lands by arguing that limited pre-statehood federal action—designation of Utah Lake as a potential reservoir site, a purpose for which it has never been used—totally defeated Utah's sovereign title under the constitutional equal footing doctrine. Proprietary interests, it would seem, take precedence over principle.

The correct analysis is that title to the lands vests in the states at statehood under the constitutional equal footing doctrine, subject only to those powers surrendered to the national government in the Constitution. Where it is asserted that pre-statehood federal action, not amounting to a conveyance, somehow affects a new state's sovereign title, the proper test is whether that federal action, if it had been taken after the new state's admission, would validly supersede sovereign state rights. This is the same test this Court prescribed for determining the validity of conditions imposed by Congress under its article IV, section 2, clause 1 power to admit new states into the Union.

Under this test, a post-statehood designation of Utah Lake as a potential reservoir site would have had no effect on the automatic transfer of sovereign title to Utah upon its admission. Congress could not have conditioned Utah's admission to the Union on a pre-statehood federal designation having that effect, and the pre-statehood federal designation, standing alone, cannot be given an effect which Congress could not achieve under its express constitutional power to admit new states.

The decision below is an unwarranted and unnecessary diminishment of state sovereignty under the equal footing doctrine, and must be reversed.

ARGUMENT

A PRE-STATEHOOD FEDERAL WITHDRAWAL AND RESERVATION CANNOT DEFEAT A STATE'S SOVEREIGN OWNERSHIP OF LANDS UNDERLYING NAVIGABLE WATERS UNDER THE EQUAL FOOTING DOCTRINE

This Court repeatedly has recognized that the several states own the beds of navigable waterbodies as an inherent attribute of state sovereignty. The original thirteen states own the lands underlying navigable waters within their boundaries as the sovereign successors to the English crown. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842). All subsequently admitted states enter the Union on an equal footing with the original thirteen states, and accordingly must hold the same title to the lands underlying

navigable waters within their respective boundaries. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). Under this equal footing doctrine, "the states since admitted have the same rights, sovereignty and jurisdiction . . . as the original states possess within their respective borders." *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423, 436 (1867).

To implement the equal footing doctrine of *Pollard's Lessee*, the United States holds such lands in a territory "in trust for the several States to be ultimately created out of the territory." *Shively v. Bowlby*, 152 U.S. 1, 57 (1894). "[U]pon the admission of a state to the Union, the title of the United States to lands underlying navigable waters within the state passes to it, as incident to the transfer to the state of local sovereignty, and is subject only to the paramount power of the United States to control such waters for the purposes of navigation in interstate and foreign commerce." *United States v. Oregon*, 295 U.S. 1, 14 (1935). Indeed, a new state's sovereign ownership of lands underlying navigable waters is "an inseparable attribute of the equal sovereignty guaranteed to it on admission." *United States v. Louisiana*, 363 U.S. 1, 16 (1960) (citation omitted).

The transfer of title from the United States, as trustee for the new state, to the new state is automatic, *Arizona v. California*, 373 U.S. 546, 597 (1963), and is a matter of constitutional law, not federal grace:

> Thus under *Pollard's Lessee* the State's title to lands underlying navigable waters within its boundaries is confirmed not by Congress but by the Constitution itself. The rule laid down in *Pollard's Lessee* has been followed in an unbroken line of cases which make it clear that the title thus acquired by the State is absolute so far as any federal principle of land titles is concerned.

Corvallis Sand & Gravel, 429 U.S. at 374.

At the same time, this Court has recognized that the automatic transfer to the State of title to lands underlying navigable waters cannot occur where the United States has conveyed them to a third party prior to statehood. In that event, there is no title in the

United States to which the state can succeed. However, such conveyances will be found only in extraordinary circumstances:

> Because control of the property underlying navigable waters is so strongly identified with the sovereign power of government, it will not be held that the United States has conveyed such land except because of "some international duty or public exigency." A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States, and must not infer such a conveyance "unless the intention was definitely declared or otherwise made plain," or was rendered "in clear and especial words," or "unless the claim confirmed in terms embraces the land under the waters of the stream."

Montana, 450 U.S. at 552 (citations and footnote omitted). Such pre-statehood conveyances are so rare that *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), holding that the bed of the Arkansas River was conveyed to three Indian tribes prior to Oklahoma's admission to the Union and therefore Oklahoma's title to the bed was defeated, is "a singular exception" to the otherwise "established line of cases" holding that title to submerged lands vests in the states at statehood. *Montana*, 450 U.S. at 555 n.5.

Here, of course, it is not even suggested that there was a conveyance of submerged lands; instead, it is urged that a pre-statehood withdrawal and reservation has the same effect a conveyance would have had on sovereign state title. This Court has never held, or even intimated, that a federal withdrawal and reservation of submerged lands underlying navigable waters—as opposed to a conveyance to a third party—will defeat a state's title under the equal footing doctrine.[6] Nonetheless, while ac-

[6] Even where the United States has granted third party rights to submerged lands prior to statehood, a new state's title is not necessarily defeated. Instead, a new state's rights "are restricted or qualified accordingly." *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). In other words, while a pre-statehood fee simple conveyance may defeat a new state's title, the pre-statehood creation of a lesser third party interest results in a new state taking title, subject at most to a valid existing right.

knowledging that this Court has referred only to pre-statehood conveyances as having that possible effect, the lower court concluded that "the same principles also apply to pre-statehood reservations or withdrawals by the United States." 780 F.2d at 1518 (Petitioner's Appendix at 8a-9a; citations omitted).

Amici states agree with the lower court that the principle of construction applicable to an asserted pre-statehood federal conveyance—*i.e.*, that the bed of a navigable waterbody is not conveyed unless the intention to do so is made clear and plain—also applies when determining whether submerged lands were intended to be included within a pre-statehood federal withdrawal and reservation. *See* 780 Fed.2d at 1518-1519 (Petitioner's Appendix at 9a). However, that does not address the real issue presented here.

The real issue is whether a pre-statehood federal withdrawal and reservation, assuming it included the bed of a navigable waterbody, has the same effect on a new state's sovereign title that a pre-statehood conveyance would have. It does not. In several cases, this Court has been careful to recognize that a federal withdrawal and reservation, even if it included submerged lands is not a conveyance.[7] and does not affect title to the lands. *See, e.g., United States v. California*, 436 U.S. 32, 40-41 (1978) (a federal withdrawal and reservation for a national monument "thus means no more than that the land is shifted from one federal use, and perhaps from one federal managing agency, to another" and "did not and could not enhance the strength of the Government's basic claim to a property interest in the submerged lands") (footnote omitted); *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103 (1949) (an executive withdrawal for Indians was merely a reservation " 'for a particular governmental use,' not a disposal of the area") and 115-116 (temporary use, not final disposition, was at issue); *United States v. Utah*, 283 U.S. 64, 88

[7] A "conveyance" includes the passage of title by patent, *Arenas v. United States*, 332 U.S. 419, 421-422 (1944), and the vesting of equitable title in third parties, as in *Choctaw Nation*.

(1930) (a pre-statehood federal withdrawal and reservation "did not constitute a grant"); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 88 (1918) (a reservation for the benefit of Indians "was not in the nature of a private grant").

The distinction between a pre-statehood conveyance of submerged lands by the United States to a third party and a pre-statehood federal withdrawal and reservation is a substantive one. In the rare circumstances where the United States has validly conveyed submerged lands to a third party prior to statehood, as in *Choctaw Nation*, sovereignty and ownership have been severed. Following such a conveyance, the entire "bundle of rights that are commonly characterized as property"[8] has been transferred to a third party. No attributes or aspects of ownership remain linked to sovereignty, and none of those rights remain to be transferred to the new state.

In the case of a pre-statehood federal withdrawal and reservation, however, the United States has not conveyed the lands to a third party. Instead, such action merely withdraws them from the operation of the public land laws and reserves them for some limited specific purpose.

A pre-statehood federal withdrawal of lands, as distinct from a reservation,[9] can have no material effect on submerged lands underlying navigable waters. A withdrawal merely removes lands from the general public land laws relating to settlement, entry, location and sale. Submerged lands underlying navigable waters are reserved to future states under the constitutional equal footing doctrine; Congress has never made them subject to disposal under the general land laws. *Mann v. Tacoma Land Co.*, 153 U.S. 273, 283-284 (1894).

A pre-statehood federal reservation reserves the lands for some limited specific purpose. Regardless of the purpose of the limited reservation, however, since the lands are still in federal ownership and necessarily remain subject to the pre-existing constitutional

[8] *Kaiser Aetna v. United States*, 440 U.S. 164, 176 (1979).

[9] *See* n.3 *supra*.

reservation of submerged lands under which the United States holds the lands in trust for future states.

This Court addressed the effect of a federal withdrawal and reservation of submerged lands on a state's title to those lands in *United States v. California*, 436 U.S. 32 (1978). The submerged lands at issue in that case constituted a part of the territorial sea and therefore were not subject to the constitutional equal footing doctrine, *see United States v. California*, 342 U.S. 19 (1947), even though such lands were "assumed by many, and not without reason," to fall within the doctrine. *United States v. Louisiana*, 363 U.S. 1, 16 (1960). In response to the 1947 *California* decision, Congress passed the Submerged Lands Act, 43 U.S.C. §§ 1301 *et seq.* "The very purpose of the Submerged Lands Act was to undo the effect of this Court's 1947 decision in *United States v. California*, 332 U.S. 19," 436 U.S. at 37, and extend the principles of the equal footing doctrine to the submerged lands underlying the territorial sea. *Louisiana*, 363 U.S. at 16-24.

The 1978 *California* case centered on a 1949 Presidential Proclamation which enlarged the Channel Islands National Monument to include a one-mile belt of submerged lands surrounding Anacapa and Santa Barbara Islands offshore California. That federal withdrawal and reservation of submerged lands pre-dated the Submerged Lands Act, and the United States contended that the lands therefore were excepted from conveyance to California under the Act. However, this Court held that a pre-Submerged Lands Act federal withdrawal and reservation (like the 1889 designation of Utah Lake as a potential reservoir site) was only a change in federal use and management of the lands and did not strengthen any federal proprietary interest. *Id.* at 40-41. Accordingly, a federal withdrawal and reservation cannot defeat a state's title under that Act.[10]

If a pre-Submerged Lands Act withdrawal and reservation has no effect on a state's *statutory* title, which is, after all, merely a matter of Congressional grace, *a fortiori* a pre-statehood with-

[10] Notwithstanding Utah's right under the constitutional equal footing doctrine, it independently is entitled to the bed of Utah Lake under the Submerged Lands Act as construed in *California*.

drawal and reservation cannot defeat a state's *constitutional* sovereign title under the equal footing doctrine. Even when they are withdrawn and reserved for a specific purpose, the federal government's title to submerged lands underlying navigable waters is not enhanced. *California*, 436 U.S. at 40-41. On the other hand, as a matter of constitutional law, "the title thus acquired by the State is *absolute* so far as any federal principle of land titles is concerned." *Corvallis Sand & Gravel*, 429 U.S. at 374 (emphasis added).

The United States, however, takes the position that a pre-statehood federal withdrawal and reservation, for a limited purpose and frequently for a limited time, has the much more significant effect of defeating a state's constitutional equal footing rights for all purposes and all time. In this case, it argues that the pre-statehood designation of Utah Lake as a potential reservoir site (a purpose for which it has never been used) defeated Utah's sovereign title and therefore the United States, not Utah, now is free to lease the lakebed for the wholly unrelated purpose of oil and gas exploration.[11]

This is not the first time the federal government has taken this position. An even more egregious example appears in Sol. Op. M-36911, 86 I.D. 151 (1978). In 1943, Acting Secretary of Interior Abe Fortas issued Public Land Order No. 82 ("PLO 82") which, among other things, withdrew 48.8 million acres, constituting all of Alaska's North Slope, and reserved the minerals therein "for use in connection with the prosecution of [World War II]." Although the war ended in 1945, PLO 82 was not revoked until 1960, shortly after Alaska was admitted to the Union in 1959. Notwithstanding that (1) PLO 82 only reserved minerals, (2) the purpose of that limited reservation expired with the end of the war in 1945, and (3) it was revoked entirely in 1960, the Solicitor of

[11] "The controversy that gave rise to this litigation occurred in the autumn of 1976 when the Bureau of Land Management of the Department of Interior began to issue oil and gas leases on the bed of Utah Lake—an Act that the state viewed as a violation of its ownership and property rights to the bed of Utah Lake." 780 F.2d at 1516 (Petitioner's Appendix at 2a) (footnote omitted).

Interior in 1978 concluded that it nonetheless totally defeated Alaska's sovereign title to all submerged lands underlying navigable waters in the entire 48.8 million acre area.[12]

In this bootstrap manner, the federal government is systematically seeking to transform narrow pre-statehood federal actions having no effect on title—in this case, a never-implemented designation of a potential reservoir site; in the case of PLO 82, a temporary, now revoked reservation of only the minerals for use in a war which ended fourteen years before statehood—into permanent federal retention of the entire fee. Such over-reaching is not necessary to any legitimate federal interest. What is worse, it can come only at the expense of the states' sovereign rights under the constitutional equal footing doctrine, and would fundamentally alter the relationship between the states and the United States.

This Court has recognized that federal ownership of lands underlying navigable waters, as now claimed by the United States, poses a serious threat to state sovereignty while state ownership poses no threat to federal interests:

> To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of State sovereignty, and deprive the States of the power to exercise a numerous and important class of police powers. But in the hands of the States this power can never be used so as to affect the

[12] Apparently recognizing the potentially devastating effect of this opinion on Alaska and its oil company lessees in the Prudhoe Bay area, the Solicitor concluded in 1983 that, while (in his opinion) PLO 82 defeated Alaska's sovereign title, the state could gain title to submerged lands underlying navigable waters by selecting them under the Alaska Statehood Act. *See* Sol. Op. 36949, 91 I.D. 67 (1983). The Bureau of Land Management has subsequently confirmed Alaska's title under this attentuated approach. The United States continues to press its argument against sovereign state title, however, with respect to submerged lands in the National Petroleum Reserve-Alaska in *Alaska v. United States*, Nos. A83-343, A84-485 and A86-181 (Consolidated) (D. Alaska, filed July 5, 1983, October 11, 1984 and March 27, 1986, respectively).

> exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. For [state sovereignty is] but municipal power, subject to the Constitution of the United States, "and the laws which shall be made in pursuance thereof."

Pollard's Lessee, 44 U.S. at 230.

The "injury" that state sovereignty might suffer from the wielding of this "weapon" by the United States goes well beyond a mere infringement of a proprietary interest. A state's sovereign title to the lands underlying navigable waters is much more than a simple property right:

> [I]t is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.

Illinois Central Railroad Co. v. Illinois, 146 U.S. 387, 452 (1982). The lower court failed to acknowledge these fundamental principles and the analytic approach which they require.

The proper analysis, one which harmonizes a state's constitutional right to be admitted to the Union on an equal footing and the federal government's ability to discharge its constitutional duties, is that title to the lands vests in the states at statehood, subject only to those powers surrendered to the national government in the Constitution.[13] *Shively*, 152 U.S. at 57-58. Under this

[13] The most obvious example of these is "the paramount power of the United States to control such water for purposes of navigation in interstate and foreign commerce" under the Commerce Clause, article I, section 8, clause 3. *United States v. Oregon*, 295 U.S. at 14. While *amici* states do not necessarily agree, one lower court has found that these powers also include the power to regulate the use of state-owned submerged lands and waters to protect federal property interests under the Property Clause, article IV, section 3, clause 2. *See Minnesota ex rel. Alexander v. Block*, 660 F.2d 1240 (8th Cir. 1981), *cert. denied* 455 U.S. 1007 (1982) (under the Property Clause, the United States can regulate the use of state-owned submerged lands and waters in the Boundary Waters Canoe Area).

approach, transfer of sovereign title to a new state and the federal government's ability to discharge its national responsibilities are not incompatible, as the lower court apparently assumed. The federal government's exercise of the powers surrendered to it in the Constitution simply does not depend on federal ownership of the beds of navigable waters. *See, e.g., Arizona v. California*, 373 U.S. 546, 597-598 (1963) (state ownership of submerged land "cannot be accepted as limiting the broad powers of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV, § 3 of the Constitution").

Indeed, even where the states clearly have surrendered such a power to the national government, a pre-statehood exercise of that power will not necessarily diminish a newly-admitted state's sovereign rights. Pre-statehood federal action should be presumed an exercise of Congress' express power, under article IV, section 3, clause 2, to "make all needful rules and regulations respecting the territory or other property belonging to the United States." Such "needful rules and regulations respecting the territory" should not be viewed, as the United States contends here, as defeating or otherwise limiting a new state's sovereign rights where such a result is not required.

For example, in *Escanaba Co. v. Chicago*, 107 U.S. (17 Otto) 678 (1883), it was contended that a pre-statehood provision in the Northwest Ordinance of 1787, providing that the navigable waters of the territory were to remain free for public use, limited Illinois' post-admission power to construct bridges across the Chicago River. This Court stated:

> [The Ordinance's] provisions could not control the authority and powers of the State after her admission. Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the Ordinance of 1787 or the legislation of Congress, it ceased to have any

> operative force, except as voluntarily adopted by her after she became a State of the Union. On her admission, she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States. She was admitted and could be admitted only on the same footing with them. The language of the Act of Admission is "on an equal footing with the original States *in all respects whatever*." Equality of constitutional rights and power is the condition of all the States of the Union, old and new. Illinois, therefore, as was well observed by counsel, could afterwards exercise the same power over rivers within her limits that Delaware exercised over Blackbird Creek, and Pennsylvania over the Schuylkill River.

107 U.S. (17 Otto) at 688-689 (emphasis in original; citation omitted).

Amici states do not suggest that pre-statehood federal action can have no continuing effect after admission of a new state to the Union. However, where it is asserted that pre-statehood federal action, not amounting to a conveyance, somehow affects a new state's sovereign title under the equal footing doctrine, as is urged here, the proper test is whether that federal action, if it had been taken after the new state's admission, would validly supersede state sovereign rights.

This is the same test this Court described for determining the validity of conditions imposed by Congress under its article IV, section 2, clause 1 power to admit new states into the Union. In *Coyle v. Smith*, 221 U.S. 559 (1911), it was contended that a provision in the 1906 Act admitting Oklahoma to the Union precluded the relocation of the state capitol from Guthrie to Oklahoma City. In rejecting this contention, this Court drew on the equal footing doctrine of *Pollard's Lessee*: "The plain deduction from [*Pollard's Lessee*] is that when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts or stipulations embraced in the Act under which the new state came into the Union, *which would not be valid and effectual if the subject of*

Congressional legislation after admission." *Coyle* 221 U.S. at 573 (emphasis added); *compare United States v. Sandoval*, 231 U.S. 28 (1913) (a pre-statehood federal prohibition on the introduction of alcohol into Indian country, reiterated in the New Mexico Enabling Act, does not encroach on that state's sovereign police power after admission because it was a legitimate exercise of Congress' express power to regulate commerce with Indian tribes).

It is particularly appropriate to apply the *Coyle* analysis in this case. *Coyle* expanded the equal footing doctrine of *Pollard's Lessee*, which applied it only in the context of title to the beds of navigable waterbodies, to the broader context of sovereign state rights generally. Its application here brings it full circle, once again applying it in the title navigability context from which it came.

Applying the *Coyle* analysis to this case is straightforward. A post-statehood federal designation of Utah Lake as a potential reservoir site would not have affected the automatic transfer of sovereign title to Utah. Accordingly, under *Coyle*, Congress could not have conditioned Utah's admission to the Union on the pre-statehood federal designation having that effect. *A fortiori*, the pre-statehood federal designation, standing alone, clearly cannot be given an effect which Congress could not achieve under its express constitutional power to admit new states.

Amici states believe this analytic approach strikes the proper balance between the inherent sovereign rights of the several states and the powers surrendered to the national government in the Constitution. On the one hand, it avoids the situation presented here where the lower court held that the limited pre-statehood federal withdrawal and reservation of Utah Lake as a potential reservoir site, never implemented, totally defeated Utah's sovereign title under the equal footing doctrine. At the same time, it ensures that the several states' inherent sovereign rights under the equal footing doctrine do not detract from or limit the United States' ability to discharge its constitutional responsibilities.

The potential implications of this case go to the heart of the relationship between the several states and the national govern-

ment. This Court's development and consistent application of the equal footing doctrine in the title navigability context merely reflects the broader proposition, central to our federal system, that all states are "equal in power, dignity and authority." *Coyle*, 221 U.S. at 567. Sovereign state rights, including a state's sovereign title to submerged lands (in the absence of a valid pre-statehood conveyance), cannot turn on pre-statehood federal action. The lower court's decision, denying Utah's sovereign title to the bed of Utah Lake because of pre-statehood federal action, must be reversed.

CONCLUSION

The decision below is an unwarranted and unnecessary diminishment of state sovereignty under the equal footing doctrine. It is not supported by any of this Court's decisions and is in direct conflict with this Court's only decision addressing a federal withdrawal and reservation of submerged lands. For the foregoing reasons, as well as those advanced by petitioner State of Utah, the decision below must be reversed.

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Respectfully submitted,

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